No. 88-1022

Supreme Court, U.S.
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# In The Supreme Court Of The United States

OCTOBER TERM, 1988

HENRICO COUNTY PUBLIC SCHOOLS, MALCOLM M. CHRISTIAN, WILLIAM C. BOSHER, JR., MORTON BRADMAN, JOANN MARCHANT, PATRICIA MARTIN, GWENDOLYN WHITING, DOROTHY SUGERMAN, and DONALD MAYFIELD,

Defendants/Petitioners,

v.

JONATHAN SPIELBERG, a minor by his parents, Howard and Susan Spielberg, as his next friend; HOWARD SPIELBERG; and SUSAN SPIELBERG,

Plaintiffs/Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

## APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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No. 87-3640

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Jonathan Spielberg, a minor, by his parents, Howard and Susan Spielberg, as his next friend; Howard Spielberg; Susan Spielberg,

Plaintiffs-Appellees,

versus

Henrico County Public Schools; Malcolm M. Christian, Chairman, Henrico County School Board; William C. Bosher, Jr., Superintendent, Henrico County Public Schools; Morton Bradman, Assistant Superintendent for Instructional Support Services, Henrico County Public Schools; Joann Marchant, Principal, Virginia Randolph Special Education Center, Henrico County Public Schools; Patricia Martin, Special Education Teacher, Virginia Randolph Special Education Center, Henrico County Public Schools; Gwendolyn Whiting, Home Support Trainer, Virginia Randolph Special Education Center; Dorothy Sugarman, Social Worker, Henrico County Public Schools; School Psychologist, Henrico County Public Schools,

Defendants-Appellants.

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No. 87-3643

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Jonathan Spielberg, a minor, by his parents, Howard and Susan Spielberg, as his next friend; Howard Spielberg; Susan Spielberg,

Plaintiffs-Appellants,

versus

Henrico County Public Schools; Malcolm M. Christian, Chairman, Henrico County School Board; William C. Bosher, Jr., Superintendent, Henrico County Public Schools; Morton Bradman; Assistant Superintendent for Instructional Support Services, Henrico County Public Schools; Joann Marchant, Principal, Virginia Randolph Special Education Center, Henrico County Public Schools; Patricia Martin, Special Education Teacher, Virginia Randolph Special Education Center, Henrico County Public Schools; Gwendolyn Whiting, Home Support Trainer, Virginia Randolph Special Education Center; Dorothy Sugarman, Social Worker, Henrico County Public Schools; School Psychologist, Henrico County Public Schools,

Defendants-Appellees.

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Appeal from the United States District Court for the Eastern District of Virginia, at Richmond, Robert R. Merhige, Jr., Senior District Judge. (CA-86-304)

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Argued: April 6, 1988 Decided: August 5, 1988

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Before WIDENER, ERVIN, and WILKINS, Circuit Judges.

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Joseph T. Tokarz, II for Appellants; Thomas Franklin Guernsey for Appellees.

ERVIN, Circuit Judge:

Jonathan Spielberg is a severely retarded nineteen year old resident of Henrico County, Virginia. Since 1977, the Henrico County Public Schools have paid the full cost of his education at the Melmark School ("Melmark"), a residential facility in Pennsylvania, under the Education of All Handicapped Children Act ("EHA"), 20 U.S.C. § 1401, et seq. In March 1985, the county initiated a reevaluation of Jonathan's placement which concluded that he could be educated at a local school. His parents appealed that decision, seeking

to continue his institutional placement. The district court reversed the state administrative decision, first finding that the county violated EHA procedures, and on reconsideration finding that Jonathan requires institutional placement. We affirm based on procedural violations of the EHA.

I.

Jonathan Spielberg possesses the functional skills of an eighteen month old child. His capabilities are extremely limited, and his individualized education programs ("IEP") at Melmark have concentrated on survival skills, such as toilet training. At Melmark, where he continues to study under the "stay put" provision of the EHA, 20 U.S.C. §1415(e)(3), he goes to school

throughout the year and receives after school and evening care and training.

The 1985 reevaluation began only nine months after a regular triennial evaluation which continued Jonathan's Melmark placement. From the beginning, county officials focused on a new placement at Virginia Randolph Special Education Center ("Randolph"), a public facility in Henrico County. After a series of letters and meetings between school officials and the Spielbergs, a new IEP was drawn up providing for Jonathan to attend Randolph during the day while living at home. He would attend school 5-1/2 hours per day during a nine month school year and four hours daily during a six week summer session. After school activities would be home-based, involving either his parents or a hired caretaker, with training available

for them from a trainer provided by the school.

The Spielbergs first appealed the placement decision administratively. The local hearing officer concluded that there were no procedural violations of the EHA, and that the new IEP was appropriate, but that Jonathan required residential placement at Melmark. The state reviewing officer affirmed on the procedural compliance issue, but reversed on the placement issue, finding Randolph placement to be appropriate. The Spielbergs appealed this decision to the district court under 20 U.S.C. § 1415 (e)(2).

The district court initially found that the school system violated EHA procedure by determining appropriate placement before developing an IEP. See 34 C.F.R. § 300.552. The court based its

finding on a series of letters written before the IEP meeting held in November, 1985, which focused on a change from Melmark to Randolph. Based on the procedural violation, the court ordered the continuation of Melmark placement.

The court subsequently vacated its initial decision in light of 34 C.F.R. § 300.347 and Patterson C. v. Board of Education of Prince George's County, No. M-85-3948 (D. Md. Sept. 23, 1986), aff'd, No. 86-2638 (4th Cir. May 7, 1987)(per curiam). In Patterson C., the courts affirmed an IEP developed after placement in a private school was decided. Section 300.347 specifically calls for a chosen private school to participate in IEP development. After vacating his earlier decision, however, Judge Merhige reached the same result on the merits. He found that the burden of

proof was on the defendants as they were seeking to change Jonathan's placement. He further found that they had not carried that burden by showing that Jonathan would receive educational benefits at Randolph. Therefore, he ordered the Melmark placement to continue. The defendants appeal his decision regarding placement, and the Spielbergs appeal his finding of procedural compliance.

II.

Congress, through the EHA, uses federal money to induce the states to provide handicapped students with a free appropriate public education ("FAPE"). An IEP is developed for each handicapped child by school officials and the child's parents. Educational placement is based on the IEP, which is revised annually.

Disputes regarding the IEP or placement are subject to administrative and judicial review.

In judicially reviewing the administrative outcome, the courts should make "independent decisions based on a preponderance of the evidence." Board of Education of Hendrick Hudson Central School District v. Rowley, 458 U.S. 176, 205 (1982); see 20 U.S.C. § 1415(e)(2).[1]

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1 20 U.S.C. § 1415(e)(2) provides:

> Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the

Due weight shall be given to state administrative proceedings, as the primary responsibility for developing IEPs belongs to state and local agencies in cooperation with the parents, not the courts. Rowley, 458 U.S. at 206-207. The reviewing court should make two inquiries: (1) Did the school board procedurally comply with the EHA and its implementing regulations? (2) Is the IEP reasonably calculated to provide

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1 (cont'd) administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

educational benefits to the child? Id.[2]

The district court found that the defendants decided to change Jonathan's placement from Melmark to Randolph before developing a new IEP to support the change. Under the EHA, the general rule is that placement should be based on the

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[2] The district court based its decision on the defendant's failure to prove that the proposed placement at Randolph was reasonably calculated to provide educational benefits. It assigned the burden of proof to the defendants as the party seeking to change Jonathan's placement. See Burger v. Murray City School District, 612 F. Supp. 434 (N.D. Ga. 1984). The burden, however, is more properly allocated to the party bringing the civil action to challenge the state administrative decision. See Tracey T. v. McDaniel, 610 F. Supp. 947 (N.D. Ga. 1985). Although we reach the same result as the district court based on procedural noncompliance, infra, we cannot affirm its reasoning because of this misallocation of the burden of proof.

IEP. 34 C.F.R. §300.552.[3] The appendix interpreting the EHA regulations states that "IEP objectives must be written before placement." 34 C.F.R. Part 300, App. C., Question 42. The decision to

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[3] 34 C.F.R. §300.552. provides:

§ 300.552 Placements.
Each public agency shall insure that:

(a) Each handicapped child's educational placement: (1) Is determined at least annually, (2) Is based on his or her individualized education program, and (3) Is as close as possible to the child's home;

(b) The various alternative placements included under § 300.551 are available to the extent necessary to implement the individualized education program for each handicapped child;

(c) Unless a handicapped child's individualized education program requires some other arrangement, the child is educated in the school which he or she would attend if not handicapped; and

(d) In selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of services which he or she needs.

place Jonathan at Randolph before developing an IEP on which to base that placement violates this regulation as interpreted by the Secretary of Education. It also violates the spirit and intent of the EHA, which emphasizes parental involvement. After the fact involvement is not enough.

The court below vacated its initial finding of procedural noncompliance because in some instances, the placement decision can precede IEP development. See Patterson C., supra. 34 C.F.R. §300.347 calls for the private school which a child will attend to participate in IEP development. Patterson C. and §300.347, however, reflect the need to include any outside parties like private schools in IEP development. In the majority of cases, the child will be educated in public facilities, not

private ones. Thus, there is no reason to predetermine placement and involve representatives of the chosen private school in IEP development. Since Randolph is a public school, the general rule, not the exception, applies, and placement should have followed IEP development.

The defendants violated EHA procedures when they resolved to educate Jonathan Spielberg at Randolph, and then developed an IEP to carry out their decision. This failure to follow EHA procedures is sufficent to hold that the defendants failed to provide Jonathan with a FAPE. See Hall v. Vance Cty. Bd. of Educ., 744 F.2d 629, 635 (4th Cir. 1985). Therefore, the district court order that he remain in his current placement is

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

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No. 87-3640
No. 87-3643

---

Jonathan Spielberg, et al.

Plaintiffs-Appellees,

v.

Henrico County Public Schools, et al,

Defendants - Appellants.

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On Petition for Rehearing with Suggestion for Rehearing In Banc

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Upon consideration of the motion of the Virginia School Boards Association for leave to appear as amicus curiae on rehearing,

IT IS ORDERED that the motion is denied.

The apellants' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for the rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Ervin, with the concurrence of Judge Widener and Judge Wilkins.

For the Court

[signed]

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CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

| | | |
|---|---|---|
| JONATHAN SPIELBERG, et al., Plaintiffs, | ) | |
| v. | ) | Civil Action No. 86-0304-R |
| HENRICO COUNTY PUBLIC SCHOOLS, et al., Defendants. | ) | |

MEMORANDUM

This matter comes before the Court on defendants' Motion to Alter or Amend Judgment. See Fed.R.Civ.P. 59(e). The parties having briefed and argued the matter, it is ripe for disposition.

Procedural Background

In its memorandum opinion of January 23, 1987, the Court held that the defendants[1] violated the applicable procedures of the Education of All Handicapped Children Act (EAHCA) in

determining to change plaintiff Jonathon Spielberg's educational placement prior to the development of his Individualized Education Program (I.E.P.). The Court concluded that, because of this procedural violation, Jonathon was entitled to remain in his then-current placement. Consequently, it did not address the second issue raised by the plaintiffs: whether Jonathon can receive an appropriate education at the Virginia Randolph Special Education Center (Virginia Randolph), the placement proposed by the defendants.

In the motion before the Court, the defendants seek a judicial determination of the educational placement issue left unresolved by the Court. Additionally, the defendants seek a modification of the Court's earlier opinion to reflect that the defendants did not violate the

procedures of the EAHCA and applicable regulations.

After considering the matter, the Court will address the placement issue and determine whether Jonathan can receive an appropriate education at Virginia Randolph. The Court will additionally reconsider its earlier ruling and determine the correctness of its original conclusion that the plaintiffs are entitled to relief on the basis of an alleged procedural violation.

Though the Court, in its memorandum of January 23, 1987 briefly recited the factual aspects of this litigation in the interest of a, hopefully, better understanding of the Court's conclusion reference the pending issues, the Court will enlarge upon its factual findings.

Jonathon Spielberg is an eighteen year-old handicapped child who is severely and

profoundly mentally retarded. In addition to his extremely low cognitive abilities, Jonathon has little ability to "generalize" his experiences, with the result that those skills acquired in one environment, even as part of a regular routine, are not easily transferred to other environments. Because of his minimal intellectual capabilities, Jonathon's educational goals focus on attaining self-help skills such as those relating to toileting, dressing, eating, mobility, and leisure. The parties have stipulated that the child is capable of continued learning.

Since 1977, Jonathon has been enrolled in a residential educational program at Melmark, an educational facility located in Berwyn, Pennsylvania. The funding for Jonathon's education at Melmark has been provided by Henrico County pursuant to

state and federal law. See 20 U.S.C. §§ 1411 to 1420; Va. Code §22.1-218. Each year, in accordance with special education regulations, Melmark has developed an I.E.P. for Jonathon which was then approved by the defendant Henrico County Public Schools. This process continued up through and including the May, 1985 I.E.P.

Beginning in March, 1985, the defendants began to take a more active role in Jonathon's education. Specifically, defendant Morton Bradman informed the plaintiffs by letter that Jonathon would be reevaluated in the month of April "to determine an appropriate placement for him...." Joint Exhibit 101. A subsequent letter noted that Jonathon was the only handicapped child from Henrico whose education was provided outside the state and explained

that the primary purpose of the reevaluation was to "determine if we can offer an appropriate program for Jonathon in [Henrico]...." Joint Exhibit 103.

Ultimately, the result of the reevaluation was a determination by the defendants that Jonathon could receive an appropriate education at Virginia Randolph. Virginia Randolph is an educational facility designed to meet the needs of emotionally disturbed, trainable mentally retarded or severely and profoundly handicapped children. At present, of approximately 133 students attending the school, 49 are severely and profoundly handicapped, and 15 of those are over the age of 15 years. The severely and profoundly handicapped exhibit characteristics of I.Q.s lower than 20, poor self-help skills, need for prompting, and lack of awareness of

danger. Some children have aggressive tendencies, some have tantrums, some are non-ambulatory. During school hours, Virginia Randolph offers the appropriate educational and related services to establish itself as a "state of the art" school. It does not, however, provide services beyond the school day as part of its regular program. Instead, a person is employed full time to assist parents or other caretakers in developing programs for the home. This person is referred to as a "home trainer."

After giving notice of their intention to propose a change in Jonathon's placement, the defendants met with the plaintiffs and others on October 29 and November 4, 1985, to revise Jonathon's I.E.P. Those meetings, however, failed to yield a program that was completely acceptable to all parties. Additionally,

the parties could not agree on whether Jonathon's educational needs could be met in a daily, as opposed to residential, setting.

The plaintiffs subsequently sought a due process hearing as provided in the EAHCA and Virginia law. The plaintiffs raised three general issues: (1) the appropriateness of the I.E.P. proposed by defendants; (2) the appropriateness of the proposed change of placement from a residential program to a daily program; and (3) alleged violations of plaintiffs' procedural rights under the law.

These three issues were addressed to a Hearing Officer who took evidence and issued an exhaustive Post Hearing Report on March 5, 1986. The Hearing Officer, after making certain modifications, approved the defendants' proposed I.E.P. He determined, however, that Jonathon

could not receive an appropriate education in a daily program such as that proposed in connection with Virginia Randolph. Finally, he concluded that the plaintiffs' procedural rights had not been violated.

The parties filed cross appeals on the Hearing Officer's rulings respecting the proposed placement and procedural rights issues. A Reviewing Officer heard the appeals and issued a report reversing the Hearing Officer's conclusion that the Virginia Randolph placement was inappropriate and affirming the Hearing Officer's failure to find a procedural violation. The plaintiffs appealed these adverse determinations to this Court pursuant to 20 U.S.C. §1415.

On January 23, 1987, after hearing testimony from witnesses and reviewing the documentary evidence on file, the

Court entered a memorandum opinion disposing of the case on one of the two grounds presented. The defendants subsequently filed the instant motion to alter or amend that judgment.

The Appropriate Placement

The first issue presented by the defendants' motion is whether Jonathon can receive an appropriate education at Virginia Randolph. Because it is the defendants who advocate that Jonathon be moved from his current placement at Melmark, where he is concededly receiving an appropriate education, the burden of establishing the propriety of the Virginia Randolph placement by a preponderance of the evidence is on the defendants. See Burger v. Murray County School District, 612 F. Supp. 434 (N.D. Ga. 1984); 20 U.S.C. §1415(e)(2).

To demonstrate that a given placement is appropriate, the proponents must show that the child can "benefit educationally" from the instruction and related services provided. See Hendrick Hudson District Board of Education v. Rowley, 458 U.S. 176, 203 (1982). Phrased another way, the defendants must satisfy the Court that the proposed educational placement is reasonably calculated to enable the child to receive educational benefits. See, e.g., Hall by Hall v. Vance City Board of Education, 774 F.2d 629, 635 (4th Cir. 1985). As the Hall court noted, however, the Supreme Court has recognized "that no single substantive standard can describe how much educational benefit is sufficient to satisfy..." the requirements of the EAHCA. "Instead, the Supreme Court left that matter to the

courts for a case-by-case determination.... Clearly, [however], Congress did not intend that a school system could discharge its duty under the EAHCA by providing a program that produces some minimal academic advancement, no matter how trivial." Hall, supra, 774 F.2d at 635-36.

The Hearing Officer found that the defendants had failed to prove that Jonathon can receive sufficient educational benefit from the program at Virginia Randolph. After reviewing Jonathon's educational goals as indicated by his I.E.P., including the development of self-feeding, grooming, dressing, and toileting skills, the Hearing Officer determined, in accordance with the expert testimony he had received, that Jonathon's educational needs cannot be met in a daily program such as that

proposed by the defendants. In essence, he found that Jonathon's educational activities need to be carried out continuously to provide educational benefit.

The Hearing Officer further found that Jonathon's unique educational goals need to be addressed in an environment of such consistency and structure that a residential component is required.

Based on the above findings, the Hearing Officer concluded that the proposed day program does not offer an appropriate public education for Jonathon.

The Reviewing Officer rejected the Hearing Officer's conclusion that Jonathon requires more than the day program to receive an appropriate education. The Reviewing Officer based his analysis on an examination of



Jonathon's present educational program at Melmark and Jonathon's progress there. He first noted that Jonathon is receiving educational benefit at Melmark, a fact not disputed by the parties. He found, however, that based on the down/dead time, non-functional activities, and inconsistent carryover to the living environment, the Melmark program does not provide consistency and structure. Accordingly, the Reviewing Officer found, contrary to the finding of the Hearing Officer, that Jonathon does not need consistency and structure to receive that Jonathon does not need consistency and structure to receive educational benefit. He went on to find that the residential placement at Melmark is primarily custodial, and not educational.

Based on these findings, and without directly addressing the Hearing Officer's

finding that Jonathon's educational activities need to be carried out continuously, the Reviewing Officer concluded that Jonathon can receive an appropriate education at Virginia Randolph.

After reviewing the evidence in the case, this Court concludes that the defendants have not met their burden of establishing that Virginia Randolph is an appropriate placement for Jonathon. This conclusion is based on the limited nature of the Virginia Randolph program in comparison to the broad character of Jonathon's educational goals.

A review of Jonathon's I.E.P. establishes that the bulk of his educational goals consist of mastering activities which arise in "daily living"; that is, when Jonathon arises in the morning, when he eats his meals, when he

bathes, and when there is need for toileting. These activities or skills are needed throughout Jonathon's waking hours and cannot be contained within a six-hour period of the day. The I.E.P. itself, which, as modified by the Hearing Officer, has not been challenged by any of the parties, states that these activities are to be carried out in all appropriate environments. Clearly, the appropriate environment for such activities is not limited to six hours at an educational facility, even one that is "state of the art." This Court agrees with the Hearing Officer that "[b]ecause this child cannot learn in the abstract and cannot generalize skills from one environment into another and because the skills which this child needs to acquire are directly and predominantly associated with activities beyond a classroom, it is

found that the short-term instructional objectives would be meaningless to the Annual Goals if applied only during day program hours."

The parties do not dispute that Jonathon has made educational progress at Melmark. None of the parties, however, would describe Jonathon's progress there as "rapid" or "great," nor could they. Jonathon's acquisition of self-help skills is necessarily incremental. The program proposed by the defendants, however, contemplates much less instructional time than is now provided to Jonathon over the course of a year. Many of the activities reflected in Jonathon's I.E.P. are those naturally engaged in during the hours sought to be eliminated from his current program, including in whole or in part dressing, eating, toileting, and grooming. While

Jonathon may be able to derive some theoretical educational benefit from defendants' program with respect to these activities, the Court concludes that any such benefit would not satisfy the requirements of Rowley and Hall.

Because the defendants have not demonstrated that the proposed placement at Virginia Randolph is reasonably calculated to provide educational benefit to Jonathon, defendants may not change Jonathon's current placement at this time.

The Placement Decision

The second issue presented by the defendants' motion to alter or amend judgment is whether the Court erred in concluding that the defendants had committed a procedural violation by determining to change Jonathon's

placement prior to the development of his I.E.P. See Memorandum Opinion at 7 (January 23, 1987). After reconsidering the matter, the Court concludes that its earlier determination was in error.

The basis for the Court's earlier opinion was that the defendants violated the regulation requiring the responsible public agency to insure that each handicapped child's educational placement is based on his or her I.E.P. See 34 C.F.R. §300.552. The Court found that the defendants had resolved to place Jonathon at Virginia Randolph prior to the I.E.P. meeting. Because the I.E.P. is developed at the I.E.P. meeting, see 34 C.F.R. § 300.343, the Court reasoned that the defendants' placement decision could not have been based on Jonathon's I.E.P.

The stated reasoning is flawed, however, because it assumes that the I.E.P. must be finalized before a placement decision may be made. The Court concludes, upon reconsideration, that under some circumstances, the placement decision must be made prior to the development of the I.E.P. See Patterson C. v. Board of Education of Prince George's County, No. M-85-3948 (D.Md. Sept. 23, 1986), aff'd, No. 86-2638 (4th Cir. May 7, 1987) (per curiam).

In Patterson C., a mentally retarded and emotionally disturbed teenager was committed to a shelter home by a juvenile court in February 1985 after sexually assaulting other children. Thereafter, an Admission, Review and Dismissal Committee (ARD) met in late February, developed a proposed I.E.P., and recommended that the child be placed in a

nonpublic daily or residential educational facility.

The ARD recommendation was accepted by the local school board and on April 1, 1985 a financial agreement was reached between the board and the county Department of Social Services to fund a residential program for the child. After receiving the results of a physical and psychological evaluation of the child from Johns Hopkins University Hospital, the board forwarded his educational records together with the evaluation to several residential educational facilities in the hope that one would accept the child. Not until October 1985 was the child accepted by such a facility and he was enrolled finally on December 9, 1985.

In the meantime, the child sought a due process hearing for, inter alia, alleged

violations of certain state and federal educational guidelines. Specifically, the child alleged that the board had failed to implement his I.E.P. within thirty days of its completion as required by Maryland regulations. Alternatively, the child contended that the board had violated the regulation mandating that an I.E.P. be developed within thirty days after the placement decision is made.

Ultimately, the case came before the district court for the District of Maryland which rejected both of the child's contentions. First, the court affirmed the administrative officer's finding that the February I.E.P. drafted by ARD was merely "proposed" and thus was not a final I.E.P. required to be implemented within thirty days. Second, the court concluded that the April 1 agreement between the board and the

Department of Social Services to find a residential education for the child was not a placement decision triggering the thirty-day limitation for developing an I.E.P. Instead, the court concluded that only the determination to place the child at a specific institution constituted a "placement decision" for purposes of the regulation.

The child appealed and the United States Court of Appeals for the Fourth Circuit affirmed the decision below, primarily for the reasons given by the district court. In resolving the second placement issue, however, the Fourth Circuit also relied on 34 C.F.R. §300.347(a)(2). That section provides that in developing I.E.P.s for children to be placed in private schools, "[t]he [responsible public] agency shall insure that a representative of the private

school attends the [I.E.P. development] meeting." The Fourth Circuit noted that compliance with this regulation was impossible until the board had located a specific school in which to place the child. Therefore, no "placement decision" could have been made prior to such time.

Based on Patterson C., this Court concludes that it misinterpreted 34 C.F.R. §300.552 as a procedural requirement that the placement decision chronologically follow the development of the I.E.P. Two aspects of Patterson C. support this conclusion. First, Patterson C. involved the interpretation of a state regulation requiring that an I.E.P. be developed no later than thirty days after the placement decision is made. See Md. Admin. Code tit. 13A, § 05.01.06. Although that provision was

not challenged as contrary to 34 C.F.R. § 300.552, the Court finds the Maryland provision persuasive in construing the federal regulation. Second, and more significantly, the Fourth Circuit in affirming the district court relied on a federal regulation which in essence mandates that a placement decision be made before an I.E.P. is fully developed in certain cases. See 34 C.F.R. §300.347; see also 34 C.F.R. Pt. 300, App. C, Question 59 at 88 (1986).

To summarize, in light of Patterson C. and 34 C.F.R. §300.347, the Court concludes that 34 C.F.R. §300.552, which states that each public agency shall insure that a handicapped child's placement is based on his or her I.E.P., is not a procedural requirement that the placement decision follow the development of the I.E.P. Therefore, the Court's

earlier determination that the defendants had violated this provision was erroneous.[2] Furthermore, after reviewing the evidence, the Court determines that plaintiffs' remaining claims regarding an alleged procedural violation are meritless. Accordingly, the Court will vacate its earlier opinion.

Conclusion

For the above stated reasons, the Court concludes that the defendants have not met their burden of establishing that the proposed placement of Jonathon Spielberg at Virginia Randolph Special Education Center is reasonably calculated to provide educational benefit. Therefore, defendants may not change Jonathon's placement at this time.

Additionally, upon further consideration, the Court concludes that the defendants did not commit a

procedural violation in determining to change Jonathon's placement. Accordingly, the Court's Memorandum Opinion of January 23, 1987, will be vacated.

An appropriate order shall issue.

[signed]

UNITED STATES DISTRICT JUDGE

Date 8 OCT 1987

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1 The term "defendants" as used throughout this Memorandum is used for convenience and may refer to any or all of the named defendants.

2 Because it determines that 34 C.F.R. §300.552 is not a procedural regulation, the Court need not provide a definitive construction of the provision. To the extent that the regulation is substantive in nature, however, the Court is of the view that its discussion regarding the appropriateness of the proposed placement addresses the requirement.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

| | | |
|---|---|---|
| JONATHAN SPIELBERG, et al., Plaintiffs, | ) | |
| v. | ) | Civil Action No. 86-0304-R |
| HENRICO COUNTY PUBLIC SCHOOLS, et al., Defendants. | ) | |

MEMORANDUM

The plaintiffs in this matter, Jonathon Spielberg, a minor, and his parents Howard and Susan Spielberg, filed this action against the Henrico County Public Schools (Henrico) and numerous school district employees (collectively "the defendants"), alleging violations of the Education of All Handicapped Children Act (the Act), Virginia state law, and plaintiffs' constitutional right to procedural due process. Jurisdiction is premised on 28 U.S.C. §1331 and 20 U.S.C.

§1415. Upon motion of the defendants and after a hearing, the Court dismissed plaintiffs' claim based upon the due process clause. The remaining claims were heard by the Court and the matter was taken under advisement pending the Court's review of the extensive exhibits filed in this action. Having considered the matter, the Court is now ready to render its opinion.

Background

Jonathon Spielberg is a handicapped child who is severely and profoundly mentally retarded as well as autistic. Since 1973, Jonathon has been enrolled in a residential educational program at Melmark in Berwyn, Pennsylvania. Melmark provides a "twenty-four hour" program to Jonathon whose educational goals focus on self-help skills such as those relating

to toileting, dressing, eating, mobility, and leisure. From 1977 to the present, the funding for Jonathon's education has been provided by Henrico County pursuant to state and federal law. See 20 U.S.C. §§ 1411 to 1420; Va. Code § 22.1-218. Jonathon remains at Melmark pending the outcome of this action. The parties have stipulated that Jonathon is capable of continued learning.

The instant case arose from Henrico's determination that Jonathon could be placed in a day program and still receive the free appropriate public education to which he is entitled. See Va. Code §22.1-215; see also 20 U.S.C. §1412. The plaintiffs challenged this determination before the local Hearing Officer on two grounds: first, that the determination itself was made in violation of the procedures set forth by state and federal

law, and second, that the proposed placement would not provide Jonathon an appropriate education as required. The Hearing Officer, after taking evidence and reviewing the memoranda submitted in the cause, ruled that Henrico failed to meet its burden of demonstrating that its proposed placement would provide Jonathon sufficient educational benefit to constitute an appropriate education and that Henrico had not substantially violated the procedural rights of the plaintiffs. Subsequently, both of these rulings were put before a Review Officer who issued an opinion reversing that portion of the Hearing Officer's decision adverse to Henrico. The plaintiffs subsequently filed this action pursuant to 20 U.S.C. §1415 challenging the Review Officer's decision.

Merits

In this action the plaintiffs raise the same two grounds decided adversely to them below. First, plaintiffs allege that the defendants failed to follow the requisite procedures in determining Jonathon's placement. Second, the plaintiffs contend that the proposed placement and corresponding educational program do not provide an "appropriate education" to Jonathon as that term is defined by law. Because this Court is satisfied that the defendants did not adhere to the proper procedures in determining to change Jonathon's placement, it expresses no opinion as to the propriety of the program.[1]

1. Scope of the Review

The United States Supreme Court has expressly delineated a court's scope of review in suits brought under 20 U.S.C.

§1415. A court's inquiry is twofold: "First, has the State complied with the procedures set forth in the Act? And second, is the individualized education program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" Hendrick Hudson District Board of Education v. Rowley, 458 U.S. 176, 206-07 (1982). In limiting the substantive review accorded by the second prong of the inquiry, the Court emphasized the significance of the procedural review contained in the first. "When the elaborate and highly specific procedural safeguards embodied in §1415 are contrasted with the general and somewhat imprecise substantive admonitions contained in the Act, we think that the importance Congress attached to these procedural safeguards

cannot be gainsaid." Rowley, supra, 458 U.S. at 205.

Although the Court referred specifically to compliance with those procedures contained in §1415, entitled "Procedural safeguards," it is evident that a reviewing court's inquiry is not so limited. The Supreme Court specifically stated that a court must satisfy itself that the state has adopted the state plan, policies, and assurances required by the Act. Rowley, supra, 458 U.S. at 206 n.27. This emphasis on procedural regularity is grounded in the assumption that, to the extent the procedural mechanisms are employed, a handicapped child will be afforded an appropriate education. Consequently, a violation of these procedures provides the basis for granting appropriate

relief. Such a violation has occurred in the present case.

2. The Placement Determination

The "free appropriate public education" to which each handicapped child is entitled under the Act is based upon the "individualized educational program" (I.E.P.) that must be developed for each child. The I.E.P. consists of a written document containing

> (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which said child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

20 U.S.C. §1401(19). The I.E.P. is developed at a meeting between a qualified representative of the local educational agency, the child's teacher, and the child's parents. Only after the I.E.P. is in place are special education and related services provided. See 34 CFR §300.342(b)(1). Additionally, and most importantly for this case, a placement decision can only be made after the development of an I.E.P. and in accordance therewith. 34 C.F.R. §§300.533(a)(4), 300.552(a)(2); see also Regulations Governing Special Education Programs for Handicapped Children and Youth in Virginia, 42 (effective Jan. 1, 1985). This latter requirement is logical in light of the contents of the I.E.P. Not until the long and short term goals of the child and the specific educational services to be provided are

determined can an appropriate placement decision be made. Only then does a decisionmaker have a basis for deciding whether the educational needs of the child can be served in a daily, as opposed to residential, program.

In the present case, the Court finds that the defendants resolved to place Jonathon in a daily program prior to the development of his annual I.E.P. and in violation of the procedures prescribed by law. This conclusion is compelled by the documentary and other evidence presented in this action which clearly evince a predetermination of the placement issue.

In July, 1984, Jonathon was given a triennial reevaluation as required by 34 C.F.R. §300.534. On March 22, 1985, however, the defendants sent a notice to the Spielbergs indicating that another reevaluation would be given Jonathon in

the month of April "to determine an appropriate placement for him . . ." Joint Exhibit 101. When the Spielbergs questioned the need for an evaluation only nine months after the triennial examination, the defendants responded that the purpose was to determine Jonathon's "continued eligibility for placement at Melmark School." Joint Exhibit 103.

Shortly after the reevaluation, but long before the I.E.P. meeting in November, counsel for the defendants stated in an August letter to plaintiffs' counsel that because "our evaluation team expects its final reports will conclude that Jonathon can be educated at Virginia Randolph [a daily program facility], the Spielbergs may wish to start arrangements for an independent evaluation now." Joint Exhibit 123. The letter went on to

note that, if Jonathon's program were changed, "Virginia Randolph [would be] the likely location for his day program."

Finally, on September 13, 1985, the defendants notified the Spielbergs that Henrico sought to change Jonathon's placement.[2] Joint Exhibit 127. Although that notice expressly stated that "a different placement [might] ultimately be chosen," the clear import of the letter is that the decision to place Jonathon in the day program at Virginia Randolph had been made.

Taken together, these documents demonstrate that Henrico determined to change Jonathon's placement from Melmark to Virginia Randolph prior to the development of his I.E.P. A special reevaluation was conducted only nine months after the regular triennial evaluation and for the express purpose of

supporting a change in placement. Correspondence subsequent to the special evaluation expresses Henrico's intent to move Jonathon to Virginia Randolph.

Placing a handicapped child without reference to his I.E.P. violates both the letter and the spirit of the Act and its implementing regulations. As discussed above, any such placement must follow from and be based on the I.E.P. See also 34 C.F.R. Pt. 300, App. C, Question 42, at 84 (1986). This methodology is especially important where, as here, the child's placement is integrally related to the special educational services to be provided. In the design of the Act, these services are selected and molded into a program at the I.E.P. meeting, see 34 C.F.R. §§ 300.343, 300.346; a meeting at which the input of the parents is of paramount importance. See Rowley, supra,

458 U.S. at 205; 34 C.F.R. §300.345. By first determining to place Jonathon at Virginia Randolph, an institution that does not provide educational services except during the day, Henrico impermissably diminished the significance of the I.E.P. meeting at which the educational needs of the child were assessed.

Conclusion

Because the defendants violated the procedures governing the determination of Jonathon's placement, the decision to place him in the day program at Virginia Randolph is invalid. Consequently, Jonathon will be permitted to remain at Melmark at Henrico's expense until such time, if any, as his placement is properly changed or his eligibility for benefits expires.

An appropriate order shall issue.

[signed]

UNITED STATES DISTRICT JUDGE

Date 23 JAN 1987

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1 The Court does feel compelled, however, to make one observation about the placement of handicapped children generally. From the briefs and other papers filed with the Court, it appears that Henrico is of the view that all children may be given an appropriate education based on a daily educational program. This position, however, conflicts with the Act and its implementing regulations. Federal law clearly contemplates that some children must be provided a residential placement to receive the educational benefits envisioned by Congress. See Abrahamson v. Hershman, 701 F.2d 223, 227 (1st Cir. 1983); Gladys J. v. Pearland Independent School Dist., 520 F.Supp. 869, 875 (S.D. Texas 1981).

2 The defendants correctly note that under 34 C.F.R. §300.504 Henrico was required to give notice to the parents regarding a proposed change in placement. The defendants contend that, because under some circumstances the placement decision may be made at the time of the I.E.P. meeting, the notice of the

2 (cont'd) proposed change in placement was provided to permit the placement decision to be made at the I.E.P. meeting itself and thus to obviate a subsequent meeting solely to determine Jonathon's placement. See 34 C.F.R. Pt. 300, App. C, Question 7, at 76 (1986). Nothing in either of the above cited references, however, conflicts with the conclusion reached here. Even assuming that a decision to change placement (as distinguished from making the original placement or maintaining the current placement) may be made in conjunction with developing the annual I.E.P., the Court finds that in this case the placement decision preceded the I.E.P. meeting. Additionally, contrary to the defendants' view, it is reasonable for the regulatory scheme to entail a notice and a "placement" meeting after the I.E.P. is developed and before a change in placement is made.

VIRGINIA DEPARTMENT OF EDUCATION

DIVISION OF SPECIAL EDUCATION AND SUPPORT SERVICES

REVIEWING OFFICER'S REPORT

IN RE: JONATHAN SPIELBERG - HENRICO COUNTY PUBLIC SCHOOLS

## I. STATEMENT OF CASE

This case comes for review on the appeal of Henrico County Public Schools (HCPS), and the cross-appeal of the parents of Jonathan Spielberg (Jonathan), from the decision of William L. Lewis, presiding Hearing Officer.

This Reviewing Officer was assigned to review this matter by letter dated March 11, 1986 from Kenneth Beachum, Associate Director, Administrative Review Service, Virginia State Department of Education. Mr. and Mrs. Spielberg were represented throughout the review by Mr. Thomas F. Guernsey and Henrico County Schools was represented by Mr. J. T.

Tokarz. Counsel for the parties were likewise advised of the Reviewing Officer's appointment by letter from Mr. Beachum dated March 11, 1986 and by letter from the Reviewing Officer.

Shortly after the Reviewing Officer's appointment, Henrico County Public Schools provided the Reviewing Officer with a typed transcript of the hearing, 921 pages in length, and with the exhibits and memorandum of the hearing. In response to requests for a continuance from each party for opportunity to review the transcript and submit additional briefs and written argument, the parties were granted until April 1, 1986 to submit original briefs and until April 11, 1986 to submit rebuttal briefs. As the original due date for the Reviewing Officer's report was April 9, 1986, the due date for the decision was extended at

this time to April 18, 1986. Each party submitted an original brief and a reply brief was submitted by counsel for the parents, Henrico County electing not to submit a rebuttal brief.

Because of the length of the transcript and documentary evidence, a second continuance on one week was granted upon the request of counsel for HCPS the Reviewing Officer additional time to prepare his opinion. This opinion is now being rendered within the time limits prescribed by law, as continued upon the written request of the parties, as provided by the Regulations.

II. FINDINGS OF FACT

Jonathan Spielberg, age 17 years, is a severely and profoundly handicapped child who is both severely and profoundly mentally retarded and autistic, as these terms are defined in the "Regulations

Governing Special Education Programs for Handicapped Children and Youth in Virginia" (State Regulations). The Hearing Officer has summarized Jonathan's condition and particular limitations as a severely and profoundly handicapped child on pages 3 through 7 of his report, and the Reviewing Officer accepts this summary of the evidence concerning Jonathan's condition as an accurate statement of the facts.

As a handicapped child within the meaning of the Education for All Handicapped Children Act of 1975, as amended, 20 U.S.C. §1400 et seq (the Act), Virginia Code §22.213, and the State Regulations, he is entitled to a "free appropriate public education" in the "least restrictive environment". Jonathan has been enrolled in residential, 24 hour a day, educational

programs since 1973, and has been enrolled at Melmark in Berwyn, Pennsylvania, with LEA funding, since 1977. An IEP has been developed for Jonathan each year since he was enrolled in the school, including the present school year.

Jonathan's severe handicaps limit the level of education that he will be able to attain. As described by the witnesses, Jonathan will probably never be able to acquire or perform meaningful vocational, job-related, skills, and his educational focus is on self-help skills designed to make the roles of his caretakers somewhat easier. These skills relate to such tasks as toileting, dressing, eating, mobility, and leisure skills. At all times Jonathan requires one to one constant prompting and supervision for the performance of all

tasks. He is unable to self-initiate and depends on others for hygiene, eating and protection. Jonathan is unaware of danger and is not able to learn from prior experiences what may be dangerous to him. He is also unable to generalize skills that he has acquired, so a change in the place where such skills are to be performed, or a change in the routine in which they are to be used, makes the performance of such skills by Jonathan in the new location or context unlikely.

The Hearing Officer has correctly concluded that despite Jonathan's low levels of functioning, there has been progress made with this child, in the above-described areas. The evidence was clear that Jonathan's ability to control his running and rumination behavior had increased, as well as his ability to assist in dressing and undressing, and in

eating. The parties are in substantial agreement that Jonathan's intellectual capacity to learn, as distinguished from his ability to acquire skills, has peaked, but they also agree that some continued progress in Jonathan's acquisition of skills can be expected. Whether past progress is attributable to his educational program, or other factors, is disputed.

HCPS proposes a nine month, six hour per day, five days per week program for Jonathan with six weeks of summer school providing four hours of instruction per day for four days a week and home instruction to assist the parents in Jonathan's after-school care. They propose that this program be implemented at Virginia Randolph, a "state of the art" day school program, with community services and in-home care also being

provided. The Spielbergs insist that Jonathan requires a residential program to obtain educational benefit.

The Hearing Officer carefully reviewed the current IEP that was developed between the parties and made certain amendments to that IEP. The parents had raised a number of concerns about the IEP as questions of violations of their procedural rights under the Act. The Hearing Officer addressed most of these concerns on pages 11 and 12 of his decision. Since these concerns have not been raised on this appeal, the Reviewing Officer agrees with the Hearing Officer's findings of fact concerning these matters and affirms these changes to the IEP.

The Reviewing Officer finds that before the drafting of the current IEP, HCPS had strongly considered the possibility of changing Jonathan's

placement from the residential placement at Melmark to a day placement, and that Virginia Randolph had been considered as an appropriate placement. The Hearing Officer found, as a matter of fact, that although the LEA may have wanted to act upon the specific day placement of Virginia Randolph, both prior to and during the drafting of the IEP, the school never voted that Virginia Randolph was the placement for this child. The evidence also shows that bringing the child back prior to the development of the IEP was certainly considered by the school, but no decision to take this action was finally made, and certainly such a decision was not implemented. A withdrawal of funding for the residential program was threatened. The Reviewing Officer finds an important fact in this context is that Henrico County, and not

the parents, finally had to request the due process hearing to determine the appropriateness of the proposed program and placement for Jonathan Spielberg.

III. ISSUES

The issues on this appeal relate to the substantive question of whether or not Jonathan Spielberg requires a residential placement and the procedural question of whether or not HCPS violated the rights of Jonathan and his parents in considering a particular placement, or a change of placement before the prior development of an IEP.

IV. HEARING OFFICER'S DECISION

The Hearing Officer ruled that the IEP developed for Jonathan Spielberg, as modified by his decision, was appropriate as to its statement of Goals and Short-Term Objectives. He further concluded that the HCPS proposed day program with

six weeks summer school and the use of a home trainer was not appropriate to meet Jonathan's educational needs. The Hearing Officer held that the parents were not denied any procedural rights concerning placement decisions made by HCPS about Jonathan.

V. CONCLUSIONS AND RATIONALE

The question of responsibililty of a local educational agency for a residential placement has had a developing case history in the period of time that Pub. L. 94-142 has been in effect. The courts have centered their decision around the following language of the Regulations:

> If a placement in a public or private residential program is necessary to provide special education or related services to a handicapped child, the program including non-medical care and room and board, must be at no cost to the parents of the child. (34 CFR 300.302)

> An LEA shall consider placement of a handicapped child in a private nonsectarian program only after it has been determined that the LEA is unable to provide free appropriate special education for a handicapped child, either locally or through arrangement with other LEAs, and such program is not appropriately available in state schools or institutions. (Va. Reg. III. B(9)(b)).

The regulations impose on the LEA responsibility only for educational placements, only those placements necessary for educational reasons. On the basis of this requirement, LEA's and the courts have distinguished educational from non-educational placements in deciding who bears the responsibility for the high cost of residential placements.

The courts have found residential placements necessary for diverse educational reasons. These have included self-help skills, need for a 24-hour structured environment to permit low-functioning students to learn, and an

inability to find any appropriate non-residential alternatives. (See Matthews v. Campbell, EHLR 551:264 (E.D. Va. 1979), Wallingford Board of Education v. State Board of Education, EHLR 552:305, and Cox v. Brown, 498 F. Supp. 823 (D.D.C. 1980). These decisions make it clear that education is not limited to the acquisition of academic and vocational skills, but include self-help and other basic skill areas.

In fact, a broad definition of education has made it difficult at times for the courts to separate educational and non-educational needs in assigning responsibility for residential placements. An early example of this difficulty is found in North v. District of Columbia Board of Education, 471 F. Supp. 136 (D.D.C. 1979). In that case, the Court ruled:

> It may be possible in some situations to ascertain and determine whether the social, emotional, medical or educational problems are dominant and to assign responsibility for placement and treatment to the agency operating in the area of that problem. In this case, all of these needs are so intricately intertwined that realistically it is not possible for the Court to perform the Solomon-like task of separating them.

In later decisions, the courts have indeed found it possible to determine whether educational or non-educational factors necessitated residential placement. In Kruelle v. New Castle County School District, 642 2d 687 (3d Cir. 1981), the Court asked whether or not residential placement was required for Paul Kruelle to learn. Here the Court directly connected residential placement and the learning process. Yet the Kruelle court failed to consider the non-educational factors that could also detrimentally effect the learning process and require residential placement, such

as medical problems and home conditions. It is this distinction that the law requires.

An analysis of the progression of case-law in this area, and suggestion for a comprehensive approach is contained in an article by Thomas A. Mooney and Lorraine M. Aronson entitled, "Solomon Revisited: Separating Educational and Other Than Educational Needs in Special Education Residential Placements" (14 Conn. L. Rev. 531 et seq.). The authors there suggest that in each case the courts, and by inference, hearing officers, must determine the reason for a particular placement and whether or not that reason is educational or non-educational. They conclude,

> If a child could receive a free appropriate public education in a local or day program but for the existence of other than educational needs, residential placement is not educational in nature. School

districts cannot be asked to divert scarce funds to meet responsibilities that properly lie elsewhere.

The Hearing Officer focused attention on the requirements under the landmark Supreme Court decision in Hendrick Hudson Board of Educ. v. Rowley, 73 L.Ed. 2d 690 (1982) and the substantive standard established by the Court for special education. Pursuant to that decision, special education, to be appropriate, must be designed "to confer some educational benefit upon the handicapped child," realizing the unique needs of each child. Consequently, a Hearing Officer or Court must decide not only whether or not services are educational or non-educational in nature, but also that a given program is designed to confer educational benefit.

In the case of a severely and profoundly handicapped child, the

Regulations anticipate that services for such a child may "require significantly more educational resources than are provided for the mildly and moderately handicapped in special education programs." However, in the case of Matthews v. Davis, 742 F.2d 825 (4th Cir. 1984), the Court approved the termination of residential services to such a severely and profoundly handicapped child because it found that the child had reached a point of diminishing marginal returns and would be unable to learn much more. Id. at 830 (emphasis added). This would indicate that analysis of a program's design to confer educational benefit, must also include careful analysis of the child to be subjected to that program, and particularly in cases involving severely and profoundly

handicapped children, there may need to be an analysis of "educability."

HCPS, by Counsel, has argued that the requirement of least restrictive environment also imposes upon the decision-maker the task of considering the cost of the educational services to be provided, along with the nature and extent of the gains to be expected with any given educational program, in determining an "appropriate" education. (See Bales v. Clark, 523 F.Supp. 1366 (E.D.Va. 1981)). A number of decisions have considered the issue of cost in determining appropriate services, but the majority of decisions, and in the opinion of this Reviewing Officer the best rule, is that cost should only be considered when one is choosing between several appropriate options. (See Clevenger v. Oak Ridge, 774 F.2d 514 (6th Cir. 1984).

Analyzing the facts of this case in light of the case law, the Reviewing Officer finds that in spite of the fact that the parent's expert witnesses all testified that Jonathan required consistent structure twenty four hours per day, and that a residential program was best for him, the Reviewing Officer is unable to conclude that he receives such structure in his present residential placement, or that his residential placement is, in fact, necessitated for educational reasons. The parents' special education expert Dr. Manfredini, wrote:

> Conversation with a child care worker who has worked with Jonathan for 11 months (average worker stay being 2 months with Jonathan's group) yielded the following information: Jonathan goes from school to a recreational activity, eats supper, has another recreational activity, returns to the unit around 7:00 p.m., bathes, has quiet play time and is in bed between 8:00-8:30 p.m..... The residential worker reported there is minimal

> carryover of the classroom program and no formal system for monitoring implementation of programs on the unit.
>
> Jonathan seeks structure and appears to function best in those environments which provide consistent, obvious, predictable structure, limits and expectations. His current educational program has several deficits: an inordinate amount of down/dead time, non-functional activities and inconsistent carryover to the living environment. (Exhibit, 172 (emphasis added).

In fact, the Hearing Officer did find that:

> Most of the witnesses who testified at the hearing and most of the documents which were introduced as exhibits on the topic of Melmark are frank in their criticism of the inconsistencies, dead time and "custodial" (emphasis added) nature of the present residential placement of the child.
>
> However, the Hearing Officer

concluded the burden of proof being on HCPS to show the appropriateness of its proposed placement, information about Melmark as an improper residential

placement was not relevant to the issue, and accordingly held for the parents.

The Reviewing Officer finds this unacceptable. As Counsel for HCPS has correctly pointed out, this case can only be considered on the basis of the facts presented. Those facts reveal that in his current placement, Jonathan's after-school care is primarily custodial, and not educational, in nature. This fact effectively rebuts the parents contention that Jonathan requires residential care for educational reasons, as he has made educational progress at Melmark although he has not received the consistency and structure there that the parents and the parents experts contend he must have to progress. There is no reason to believe that Jonathan's parents could not provide the same level of services to Jonathan that he has received at Melmark during

after-school hours. This is what HCPS proposes to do.

The Hearing Officer found that Virginia Randolph is a "state of the art" special education program for severely and profoundly handicapped children. Jonathan's after-school care requires primarily custodial, and not educational, services which the Reviewing Officer finds can be adequately provided by the parents with training and in-home services provided by the LEA.

The IEP for Jonathan was designed to confer educational benefits upon him and has been worked out by the parties with careful attention to every detail. His placement at Virginia Randolph poses a potential for some regression. However, any change in Jonathan's routine or placement poses the same threat. It is hoped that Jonathan will be able to

reacquire any skills that may be lost with such a change in placement. This Reviewing Officer cannot accept the argument that Jonathan must be continued at Melmark, for educational reasons, because of the threat that removal from Melmark will cause regression in the form of loss of skills, which Jonathan may never be able to recapture. Any change in his living environment or regimen poses the same threat for Jonathan, and the Reviewing Officer cannot contemplate that it is seriously being proposed that Jonathan is going to spend the remainder of his life in this placement. Certainly this line of reasoning cannot be sustained on educational grounds. The requirement of least restrictive environment anticipates community placements, if at all possible. The evidence fails to show that Jonathan

cannot be successfully placed at Virginia Randolph in line with HCPS' proposed IEP.

As counsel for HCPS has argued, the parents experts all testified that a 24 hour, residential placement with consistent structure and supervision would be the best for Jonathan. Parents counsel argues that these experts intended to say that such a placement and program was simply necessary for Jonathan to receive educational benefits. The Reviewing Officer finds that the facts do not support the argument of parents counsel, and the law does not require optimization of education for a handicapped child. (See Board of Education v. Rowley, 458 U.S. 176, 102 S.Ct. 3034 (1982).

Finally, the Reviewing Officer agrees with the Hearing Officer that there were no substantive procedural violations of

parents rights in the formation of the IEP and the proposal of the placement at Virginia Randolph. Although there may have been technical violations of the law in this regard, in as much as an IEP is to be completed before placement decisions are made by an LEA, such were not significant and prejudicial violations of procedure that seriously compromised the provision of a free appropriate public education to Jonathan Spielberg, and the conclusions of the Hearing Officer are affirmed by the Reviewing Officer in this regard.

The decision of the Hearing Officer is therefore affirmed in part and reversed in part. This decision is final unless either party appeals to the appropriate Court. In compliance with Chapter 5 of the Virginia Regulations, the Reviewing Officer further states:

1. He has examined the entire hearing record.
2. He is fully satisfied that the procedures at the hearing before the Hearing Officer were consistent with the requirements of due process.
3. He has determined that no additional evidence was necessary.
4. All parties were represented by counsel throughout the hearing.
5. This written report contains his decision upon completion of the review.
6. He certifies that on the 26th day of April, 1986, he mailed a copy of his decision to the parties or their counsel, to the State Department of Education, and to the Hearing Officer.

DATED: April 26, 1986

[signed]

Robert B. Easterling
Reviewing Officer

VIRGINIA DEPARTMENT OF EDUCATION
Division of Special Education and Support Services

POST-HEARING REPORT

Formal Due Process Hearing

School Division: Henrico County Public Schools

Parents: Mr. and Mrs. Howard Spielberg

Division Superintendent: William C. Bosher, Jr.

Name of Child: Jonathan Spielberg

Hearing Officer: William L. Lewis

Hearing Initiated by: Henrico County Public Schools

## Post-Hearing Decision

THIS MATTER matured for a formal due process hearing on February 6, 1986 in the School Board Offices of the County of Henrico in Sandston, Virginia. Testimony was received on February 6 and 7 and written arguments were filed by the parties on February 14, 1986. The administrative deadline within which to render a decision in this matter was extended by order dated February 24,

1986. This decision is made within the extended administrative deadline.

The Local Educational Agency, Henrico County School Board (hereinafter LEA), was represented by J. T. Tokarz. The parents and child were represented by Thomas F. Guernsey. The child did not attend the hearing.

Witnesses testifying on behalf of the LEA were: Jo Ann Marchant (Principal, Virginia Randolph Special Education Center), Morton Bradman (Asst. Superintendent for Instructional Support Services), Pat Martin (P.M.R. Teacher, Virginia Randolph) and Joseph M. Mayfield (School Psychologist, LEA). Witnesses testifying on behalf of the child were: Susan Spielberg (Mother), Samuel H. Tucker, M.D. (Neurologist), Dianne Manfredini (Special Educational Psychologist), Edna F. Roth (Ph.D.,

Professor of Social Work, V.C.U.), E. Wayne Sloop (Clinical Psychologist), Robert Christopher Kissel (Behavioral Psychologist) and Howard Spielberg (Father). In an effort to reduce the number of exhibits to be introduced, the parties submitted joint exhibits. After overruling objections from each party concerning specific documents, 177 exhibits and 8 vitae were submitted.

## ISSUES

At the conclusion of the Pre-Hearing Conference held on December 16, 1985, the attorneys were directed to submit at the beginning of the hearing written statements of the issues to be raised. The statements were prepared and submitted at the hearing along with evidence in support of the positions of

the parties; however, the issues can best be re-stated as follows:

1. Are the goals and objectives set forth in the Henrico County Public School's proposed Individualized Educational Program appropriate for the child?

2. Does a proposed placement of the child in a public, day program for nine months and for six weeks, four days per week, in Summer, together with the availability of a home trainer, provide an appropriate education for the child?

3. Did the making of a placement decision prior to the parents' acceptance of the Individualized Educational Program for the child violate the procedural rights of the child and his parents?

## POSITIONS OF THE PARTIES

LEA Position - The LEA maintains that the IEP which has been developed for the child is reasonably calculated to enable him to receive educational benefit in the least restrictive environment. A residential placement for the child constitutes an attempt to "maximize" the potential educational benefit for the child; thus, the residential placement would impose a substantive standard beyond P.L. 94-142. The LEA has no obligation to fund a residential placement of the child for what it perceives to be non-educational reasons such as after-school supervision, custodial care and parental convenience. It further argues that procedural violations, if any, do not justify the continuation of the child in an

inappropriate placement in an environment which is not the least restrictive.

Parents Position - The parents argue that the goals and objectives contained in the proposed IEP for the child are not appropriate for him and that the proposed placement in a nine month, six hour per day academic year program with a six weeks summer school of four hours per day, four days per week is not reasonably calculated to enable the child to receive educational benefit. Furthermore, they argue that his educational, psychological and medical needs are so interrelated that it is impossible to segregate the educational need. They maintain that the LEA has violated P.L. 94-142 and the supporting regulations in which a placement decision can be made only after the completion of an IEP for the child. The placement decision was made by the

LEA prior to IEP completion; consequently, the LEA has violated the procedural rights of the child and his parents.

## FINDING OF FACT

Based upon the exhibits and testimony received, it is found that:

1. Jonathan Spielberg, born August 23, 1968, reflects a complex combination of low intellectual ability, inadequate social skills and higher splintered motor abilities. He has been diagnosed recently as follows:

> This child is suffering from a non progressive organic encephalopathy associated with profound mental retardation (functional mental ability is less than a 18 month level, with a number of specific developmental levels considerably less than this, in particularly communication, and with a few somewhat more advanced splinter skills). Additionally, he is

> showing a picture of an atypical pervasive developmental disorder.... The cause of this is... certainly neurologically based.... (Tucker, Exhibit 173)

The autistic characteristics which the child exhibits include unusual reactions to objects in his environment, inability to interact, associate with or maintain eye contact with people, inability to communicate verbally by spoken words or, for the most part, even with gestures. He has never cried and seldom laughs appropriately as a result of external stimuli. Recent testing indicates that his infant mental ability measure confirmed consistently produced scores of approximately nine months over many years. His social maturity testing produces a score of 1.65 years of age. His I.Q. scores have remained below 20.

Besides his profoundly depressed I.Q., major obstacles to this child's ability to learn on a higher cognitive

level are seen in several factors. First, having no internal mechanism to self-initiate purposefully, the child is dependent upon his environment to provide external stimuli to initiate most of his actions. Stimuli can be in the form of of physical or verbal prompts, conditions of the environment, or even actions of others in the same environment. Without the external stimuli the child will become inactive and withdrawn from contact with his surroundings. He is what is known as "stimulus bound". (Anderson Clinic, Exhibit 29)

Second, His extremely low cognitive abilities place him at what is known as a "preconceptual level" (Hoffman, Exhibit 161). Even though this extremely low developmental level is not particularly instructive as far as all functioning levels are concerned (because his

development is atypical), a child with a preconceptual level has difficulty responding to spoken language alone. The child responds better and more consistently when the spoken language is accompanied with very simple gestures.

Third, the child has no ability to "generalize" his experiences from one environment to another; consequently, those skills which are learned within one environment are not easily transferred to other environments - even those in his regular routine. This inability to "generalize" is often found occurring in children with profound mental retardation and autistic children.

It is difficult to set forth in a Findings of Fact all of the Characteristics (strengths and weaknesses) of this extremely unusual ("atypical") child for each of his

weaknesses would be sufficient to trigger the utilization of special educational services in any jurisdiction; nevertheless, it is important in understanding the child that many of the these factors at least be identified:

(a) Attention span - The child has a very short, almost nonexistent, ability to stay on task without continuous gestural or physical prompting. He is extremely hyperactive and requires constant supervision to stay on task. Although there is conflicting evidence as to the actual length of time which this child can spend on a particular task without intervention, it is clear that the attention span does not exceed 60 seconds. With close supervision and possible physical restraints (use of barriers, hand-holding etc.) he has been observed to maintain some form of

assisted attention for as long as 20 minutes while seated in front of a television.

(b) Positive reinforcers - The child exhibits no sense of preference for particular items or for activities which can be used a means to positively reinforcing acceptable or desired behaviors. Because there is a lack of preference, the typical uses of positive reinforcement in educating this child are and will continue to be difficult to administer effectively. In light of the repeated references to this deficiency, the instantaneous success which Dr. Bradman had with this child is viewed as an isolated incident unlikely to reoccur consistently.

(c) Social interaction - The child almost constantly attempts to cover his ears with his hands and, if one is

physically placed at his side or in his lap, the child rotates his head so that his uncovered ear can be placed flatly upon his shoulder. The consistency of his attempts to cover his ears with his hands dramatically interferes with the ability to acquire any fine motor or even upper extremity skills. Furthermore, the refusal to socially interact with adults and peers is regularly demonstrated by his attempts to withdraw from a group and typically stare out of a window for indeterminate amounts of time. Nevertheless, there has been improvement in this area, particularly with adults.

(d) Language capabilities - The receptive language capabilities of the child are very low. He can understand a few rote phrases ("give me", "stand up", etc.) but does not show emerging abilities to conceptualize objects

through solely verbal communication. The child has even more limited expressive communication abilities. They consist of no verbal skills and, at best, simple gestural skills for three to five simple words. Beyond "cracker", "eat", and "more" there is no indication that the child understands expressive language.

(e) Cause and effect - The extremely limited cognitive abilities of the child prevent the utilization of any educational form of cause and effect learning patterns. Furthermore, the lack of any understanding of cause and effect places the child in dangerous situations in which he has no understanding either before or afterwards that the consequences are directly related to the conditions of his environment or to his actions in it. As a result the child has no fear of traffic, has no sense of

danger from stoves, etc. So severe is the deficiency that the habit or reflex of placing his hands on ears (discussed in paragraph (c) above) is a good example of what can and does happen: the child has been observed to fall while walking with his hands on his ears; there having been no internal stimulus to cause him to remove his hands and to break the fall, the child landed face first on the ground and injured his face, but he made no association between the fall and the injury to his face.

(f) Toileting - The child has not learned to be toilet trained. At best, he can be described as "toilet-timed" - that is, it is the responsibility of the staff to insure that the child is taken to the toilet on a regular basis. Diapers are used at night and, during the day, accidents are not unusual. Because

he has no internal sensors that warn him when the need to eliminate arises, he has not learned to gesture the need to use the toilet. All of the parties have confidence that he can be toilet-trained - I have serious doubts.

(g) Running - Unless the child is placed in an environment which has physical barriers (locked doors inside or hand held by staff outside), the child will attempt to run away without direction. Although it is difficult to locate the actual cause of his activity, it is suspected that it occurs as a result of external stimuli and, in particular, from his realization that there are larger open spaces into which he can run. Because of the extremely low cause and effect reasoning which the child has, the running activity places

him at any moment in time in jeopardy from a dangerous situation.

2. The extremely low intellectual capabilities of the child will limit the level of education which the child will be able to attain. Foremost among educational objectives for the child is development of selfhelp skills. At the present the child can partially dress with prompting for each item of clothing, can partially undress and can perform some eating functions; however, no basic living skill, whether it can be eating, dressing, playing, washing, or grooming, can be undertaken, conducted or completed without one to one constant prompting or communication through gestures. The child is totally dependent upon staff for all personal hygiene. He cannot button, snap, hook or zip any of his clothes. His eating must be controlled by staff

piece by piece because of his tendency to "bolt" large quantities of food at once and then regurgitate his food. Any other skills which require fine motor skills simply cannot be performed independently.

3. In spite of these extremely depressed and delayed levels of ability and functioning, there has been progress made with this child. While testings over the last ten years indicate that his I.Q., social age and mental ability levels have remained relatively constant (below an I.Q. level of 20), the progress reports, other exhibits and testimony indicate a slow, but positive pattern of improvements (discussed later) throughout the years. Those improvements, especially recent ones, cannot be attributed cavalierly to maturation, alone - certainly, intensively structured

education has had the greatest influence upon the progress.

Experts at The John F. Kennedy Institute, Baltimore, Maryland, recently determined that Jonathan may have "peaked" intellectually - that is, Jonathan may continue to learn new skills at the same cognitive level at which he now performs, but he will not reach a higher level of learning. Dr. Tucker, a pediatric neurologist, confirmed this opinion.

Although not inconsistent, the IEPs individually presented by the LEA (Exhibit 143) and by the parents (Exhibit 109) set out goals and objectives which ostensibly are reasonably calculated to provide educational benefit to the child. These goals and objectives are detailed and numerous. It is clear that the parties believe Jonathan can continue to

learn more than a marginal amount of skills and this Hearing Officer finds Jonathan able to learn in the future.

Nevertheless, there have been positive steps for this child in areas that have been identified appropriately as annual goals for him. The documents indicate that there has been significant progress in his ability to show self-control in areas of impulsive running and rumination, he has begun to show some indication of purposeful exploration of his environment, and he has shown a slight desire to be more socially responsive and interactive with adults and some peers. Although his self-help skills have not made dramatic improvements since his admission in 1977 to the present residential placement, Melmark School, there has been enough progress towards acquiring self-help

skills (in such things as hand washing, dressing, reduced wandering and running and increased social responsiveness) that it concluded that he is receiving educational benefits. Although LEA testimony pointed to the existence of not progress, but regression, when the child was transferred from Howell's Childcare to Melmark, the baseline data upon which the determination of regression was made was drawn from glowing progress reports submitted by Howell's. This Hearing Officer does not accept the Howell reports as being valid baseline data; consequently, it is found the child has not experienced regression (or loss) at Melmark.

4. Jonathan was enrolled in Howell's Childcare, Inc. in North Carolina in November, 1973. He remained at the residential school on a twelve months

basis until 1977. At that time his parents became dissatisfied with the amount of contact which they were being allowed to have with their child and became suspicious that the progress reports sent by the school were inaccurate. In particular, the parents noted a distinct difference between the levels of skills which were described in those reports and the functioning level which they were able to observe personally. As a result of this dissatisfaction and after months of searching, the parents enrolled the child in Melmark in Berwyn, Pennsylvania.

The child has remained at Melmark with funding from the LEA. An IEP for this child has been developed by Melmark each year since initially enrolling in the school. In compliance with the special education regulations dealing

with residential placements of handicapped children, the LEA was asked specifically by Melmark to participate in the IEP committee meetings or to submit comments if it was unable to send a representative to each annual meeting. Although the record indicates that the staff of the LEA and members of the evaluation teams repeatedly noted to each other apparent inadequacies of data-based programs and inconsistencies of school/residential coordination to eliminate running and mouthing of objects and to encourage the acquisition of basic skills, the only participation which the LEA has made in the development of the many Melmark IEPs has taken place in those years in which the LEA has made a concerted effort to lay the groundwork for a possible change in placement. Even with the continuous comments about the

inadequacies of Melmark and the occasional LEA input into the Melmark IEP process, the LEA has consistently approved the IEPs proposed by Melmark since 1977. Even in light of the severe criticisms made by the educational team sent by the LEA to Melmark in August, 1984, the LEA approved the 36 page Melmark IEP, dated May 6, 1985 and subsequently approved tuition grants to January 31, 1986.

After adequate notice to Melmark and to the parents, the LEA attempted to develop an IEP for the child in October and early November, 1985. A transcript of the November 4, 1985 IEP meeting was prepared (Exhibit 144). At the conclusion of the meeting there appeared to be little disagreement between the LEA and Melmark concerning the IEP in its amended form, but because the conference

was held by telephone with Melmark, logistical problems required that the IEP be typed in final form and mailed to Melmark for its review and further comments. Although promised to be returned within approximately one week of the November 4 meeting, comments from Melmark were not prepared and sent until November 20, 1985. (Exhibit 149). Those comments are not found to be significant in terms of the question of appropriateness of annual goals and short-term objectives. Primarily, Melmark was concerned with overly optimistic criteria of "100% accuracy" on many objectives, lack of "delineation of the conditions under which behaviors were to be performed", and staff inefficiency of required data collection for the many objectives proposed in the IEP.

While this Hearing Officer is reluctant to undertake the rewriting of an entire IEP, the specific objectives which have been raised by Melmark and by the parents (discussed later) should be addressed. Taking the Melmark comments first, the response made by Counsel for the LEA in its letter dated December 16, 1985 (Exhibit 164) sufficiently addresses those questions; consistently, the comments made by Melmark have been considered by this Hearing Officer and are rejected.

On December 2, 1985, the parents, by counsel, expressed their concerns for the proposed IEP (Exhibit 152). Those objections were as follows:

a) Ambiguitites in terminology.

b) Errors in recording what was agreed to in the IEP meeting.

c) Additional material which was not discussed at the IEP meeting.

d) Clarifications/additions of the Spielbergs.

e) Differences in whether a particular objective, criterion or related service is appropriate.

f) Absence of a segment of the IEP.

g) Inappropriateness of deciding placement before completing the IEP.

(Exhibit 152). Those objections will be addressed in the order in which they are set forth above:

a) Ambiguities - Clarifications have been made in the LEA letter, dated December 16, 1985 (Exhibit 164). Redrafting by this Hearing Officer is not necessary. Reference to the LEA letter is made for clarification of terminology.

b) Errors in recording - Although the IEP should reflect the agreement by the parties that Jonathan "continues running behavior" and should include a statement that he does not have "generalized learning skills in all environments", the transcript of the second IEP meeting does not reflect an agreement to place the language "All objectives in Activities of Daily Living will be carried out in all environments using same strategies." (Emphasis added). The emphasized words were not agreed upon as an appropriate explanatory note for numbered pages 1-7 of the IEP dealing with "Activities of Daily Living" (Self-help Skills, Eating/Meal, Toileting, Mobility and Domestic Skills). Nevertheless, it is found that the LEA agrees with the parents "that Jonathan would benefit from follow-through of his

classroom instruction - that is why after-school training is being offered to assist the parents or caretakers in maintaining a supportive home environment." (Exhibit 164, page 7). Lastly, the wording for the environment in which vocational skills will be addressed (pages 8 and 9 of the IEP) should be changed per agreement of the parties from "activity workshop (sheltered task)" to "simulated workshop".

c) Additional materials - Except for the question of the need for a twelve month program, the matters raised in this portion have either been agreed to by the parties or are not worthy of comment by the Hearing Officer. The twelve months issue is addressed later herein.

d) Clarifications/additions - The LEA staff has agreed with or accepted the

requests for additions and deletions contained in this section. No further comment is warranted.

e) Differences over the appropriateness of different criterion or related services - The LEA has bowed to the requests of the parents concerning many of the proposed changes in the IEP in this category; however, there remains a fundamental disagreement between the parties concerning the nature of after-school training/care. This issue will be dealt with later. On other matters, because the child cannot think beyond a precognitive level, the first three objectives on page 8 of the IEP (Vocational) are inappropriate and should be deleted. Activities requiring lower level skills should be included, but the types of skill activities must be addressed by therapists. With the

exception of "therapeutic horsemanship" which is specifically rejected as being unnecessary, all other requests for additions or deletions under this category have been honored by the LEA. Further action by this Hearing Officer on those matters is not required.

f) Absence of a segment of the IEP - The absence of a statement in the IEP concerning the present levels of educational functioning has been remedied by the LEA and no further discussion is needed on that point either.

g) Inappropriateness of deciding placement will be discussed in Paragraph 5. In addition to attempting to identify annual goals and short-term objectives for the child, the IEP committee undertook to make a determination as to placement. As the transcript reflects

(Exhibit 144), a considerable amount of debate occurred between counsel for the LEA and counsel for the parents as to the legality of making a placement decision for a specific facility or program as opposed to the more general question of residential vs. day programs. It was the contention of the counsel for the parents that procedurally selection of the day program offered by the LEA was inappropriate at that stage. It was the contention of the counsel for LEA that division of the decision-making process into first the general type of program and, second, the specific program in a subsequent meeting (and ultimately in a subsequent hearing) was dilatory and not in contemplation of what the regulations intended. While the parents are correct in arguing that the only decision which could be made at the time of drafting the

IEP was upon the issue of residential versus day programs, the procedural issue raised and argued by counsel during the hearing and in their briefs does not reflect what was actually done at that IEP meeting on November 4, 1985. Even though counsel for the LEA wanted to act upon the specific day placement of Virginia Randolph, the ensuing discussion culminated in a conversation as follows:

> MR. TOKARZ: All right. Well, we will have to disagree. I take a different view of the regs. We will have to disagree and let that be resolved in a different forum. If you want to talk in general about residential versus day program, then --
>
> MS. MARCHANT: I agree that we could readdress that. If you would like to restate your statement about where you feel the goals and objectives on this IEP can be addressed.
>
> MS. WHITING: This is Gwen Whiting again. I feel that the IEP goals could be met in a day program with six weeks summer school with no more than two to three weeks break between and services offered for after-school programming.

MS. MARCHANT: Any disagreement with that?
MR. TOKARZ: From the team?
MS. MARCHANT: Well, from the team looking at them, body language - (Exhibit 144, page 57, lines 6-24)

Nowhere does it indicate in the record that the school actually voted that the Virginia Randolph day program was the placement for this child. While everyone probably knew Virginia Randolph would be the local program ultimately, I find no procedural error was committed in this matter of placement decision-making.

Furthermore, I find that the parents have failed to come forward with adequate evidence to show that earlier in 1985 the school prematurely made the decision to bring the child back. Speculation would obviously indicate that that is what they wished to do if the evidence indicated such a move was appropriate, but as Dr. Bradman and other members testified, no formal decision had been made concerning

placement. Speculation is not sufficient to meet the parent's burden of proof in this issue.

The actions that took place between the parents and the LEA following the IEP meeting on November 4, 1985 can best be characterized as the culmination of a hostile environment. When the LEA threatened to automatically change placement of the child and terminate funding of the residential placement following a month's delay in receiving comments from the parents and Melmark (which were due one week after the IEP meeting), this Hearing Officer views those comments as purely posturing or bluffing in order to force the parents to move towards an acceptable settlement of major differences. It is not likely that the LEA could have realistically expected to be successful in forcing the hand of

Jonathan Spielberg's mother who, incidentally, is the Acting Director of the State Advocacy Department for the Developmentally Disabled for the Commonwealth of Virginia. Mrs. Spielberg is an attorney and she has under her a staff of attorneys who regularly appear in special education cases throughout the state representing parents of handicapped children. As Director, she is no stranger to formal due process hearings. Furthermore, even though counsel conducted themselves during the formal due process proceedings with utmost courtesy and concise preparation of a complicated case, friendly disagreement between these parties had not been the usual circumstance. In fact, complaint was made to the Secretary of Human Resources for the Commonwealth of Virginia concerning the representation of

Mrs. Spielberg by Advocacy Office staff attorneys. Although there was no legal impropriety with the relationship with the Advocacy Office, ultimately Mrs. Spielberg obtained other counsel. Later, similar allegations of impropriety were leveled against counsel for the LEA in attempting to represent individuals employed by the LEA. In light of the heavy-handed tactics used by both sides and in the absence of any specific procedural violation which has not already been addressed it is found that the parents' procedural rights have not been violated in this matter.

6. The LEA has a program at a separate facility called the Virginia Randolph Special Education Center with specific emphasis upon meeting the needs of serious emotionally disturbed, trainable mentally retarded or severely

and profoundly handicapped children. At present of approximately 133 students attending the school, 49 are severely and profoundly handicapped, 15 of those being over the age of 1 years. The severely and profoundly handicapped exhibit characteristics of I.Q.s lower than 20, poor self-help skills, need for prompting, lack of awareness of danger. Some have aggressive tendencies, some have tantrums, some are non-ambulatory. The staff is adequate to meet the needs of the children during the school hours and one person is employed full time to provide to the parents or other caretakers assistance in developing programs for the home. This person is referred to as a "home trainer".

The facilities used by Virginia Randolph (hereinafter VR) consist of a center-based brick school building which

shares a cafeteria with an adjoining vocational center. It utilizes home economics apartments, gardens for physical therapy, and open areas for exercise and leisure activities. In addition, appropriate emphasis is placed upon trying to get the child off of the campus and into the community through the use of facilities in the community such as bowling alleys, stores, parks, gymnasiums and public or private businesses for vocational training. In this environment the VR educational philosophy of "normalization" is approached on three theories:

a) Top-downward planning - This approach with the active participation of the family sets functional goals for the child to reach by age 22 and a program is devised with those long-term goals in mind. This type of approach is a

departure from the traditional and previously accepted "developmental" approach whereby goals were developed purely on the basis of annual or month to month projected growth.

b) Functional planning - The child is taught real tasks in the very environments in which the tasks will have to be performed or in the medium in which the activity normally occurs. For instance, learning to button the shirt when the child dresses, learning to use eating utensils during mealtime, etc. This approach is particularly beneficial to students who have problems generalizing new skills.

c) Community-based instruction - Because many handicapped children such as Jonathan can't generalize the knowledge they acquire in one environment and transfer its application to another

environment where it will be used, community-based instruction places the child within the environments where the particular activity will occur. For example, if an objective is to have a child learn how to buy an item at the store, the LEA contacts the parents weekly and asks for one or two simple items which are needed at home and the child purchases the items during community based activities.

d) Transdisciplinary - This approach calls for the crossing over of specialists from one environment into another and rejects the traditional theory that the individual specialist (occupational therapist, physical therapist, speech therapist) should provide therapy within an isolated area at designated portions of the day. In the transdisciplinary approach the

specialists either interact with the children within the classroom and at other times which provide functional relevance to the child or they provide consultation to the classroom teachers and aides to assist those individuals providing the therapy throughout the day during appropriate activities.

VR utilizes acceptable and appropriate behavior management techniques for the children attending the school. It directs those behavior management techniques to children who exhibit running impulses, aggression, self-abuse and many other unacceptable activities. The success of the techniques is recorded in data-base for systematic analysis of conditions and remedies. During school hours VR offers all of the appropriate educational and related services to establish itself as a

school reflecting "state of the art" and is found to be an excellent program for what it purports to be - a day program.

Nevertheless, the provisions for a "home trainer" for the parents do not raise the day program to the level of a structured residential environment. The availability of the "home trainer" cannot satisfy the intensive needs of this child as discussed later in these findings of fact. In addition, the services of the one home trainer are already spread among 32 other families who have children participating in the program. The IEP for Jonathan calls for participation by the home trainer with the parents for six hours per day, five days per week. Not only is this of a limited duration, but it also is unrealistic to expect the home trainer to be able to spend adequate time with the parents and child on a long term

basis and still carry the caseload already assigned to her.

7. The child in this matter has many weaknesses which must be addressed by any educational program. These seems to be little disagreement that his strengths and weaknesses, discussed in paragraph 1, do exist. The disagreement is in how to address those conditions and where to address those conditions.

The LEA witnesses generally stated that the child could receive "educational benefit" in a day program that addressed his needs. Services of a home trainer would be provided to the parents to insure that the parents learn the proper techniques for training and maintaining skills. The LEA does not view those services as necessary to the educational success of the IEP; instead the home

trainer is optional to the parents as an assistant in their domestic environment.

Similarly, the LEA has submitted to the parents a list of Community Service Board (CSB) opportunities for the child to participate in after-school care (St. Joseph's Villa), weekend respite care and extended day care (summer camps) during summer breaks from VR. These programs are not controlled by the LEA and are not considered by the LEA to be educationally related services for the child. Uncertainty exists as to the availability of those CSB programs for Jonathan and no commitments for enrollment have been made by these programs or the LEA. No testimony indicated that these CSB programs utilize or attempt to utilize through close cooperation with the LEA any of the behavioral management techniques of which Jonathan would be

familiar from VR. At best, the cooperation involves a bus which travels between VR and St. Joseph's Villa.

8. The witnesses who testified on behalf of the child each found the proposed IEP unable to meet his educational needs. Consistency of training within structured, consistent environments throughout the entire year was a central theme which ran throughout their evidence (Exhibit 169). The multitude of impairments of Jonathan make him unable to generalize any knowledge which is acquired and, if during the process of attempting to acquire a skill, inconsistent techniques or environments are used, loss of acquired skills will occur or failure to attain new skills will result. Only through a structured environment with consistent utilization of well-defined techniques will Jonathan

be able to attain and retain basic educational benefits.

The skills which it is hoped Jonathan will be able to acquire are not the skills that a normal child would be expected to acquire in an academic environment.- His goals involve basic skills for minimum interaction with this environment. They involve skills and subject areas required for bare minimum functioning. His Annual Goals in the IEP are:

a) To continue to improve equilibrim and coordination
b) To structure the environment to increase Jonathan's awareness of dangerous situations
c) To improve vocational skills
d) To improve leisure skills
e) To expand basic communication skills
f) To improve self-feeding and attending skills
g) To improve grooming and attending skills
h) To improve dressing and toileting skills
i) To improve awareness of self and others

j) To increase attending skills/eye hand coordination/fine motor skills
k) To improve understanding of various concepts
l) To improve on-task and attending skills.

(Exhibit 143) Furthermore, his IEP "Skill Areas" are broken down within the general category of "Activities of Daily Living". Within those activities of daily living the subcategories contain basic, functional activities. In the subcategory of "Self-Help Skills" Jonathan's ambitious short-term functional objectives include such items as brushing his hair, wiping his nose, washing his hands, independently buttoning, snapping, or zipping clothing, identifying clothing. On a more fundamental level are such activities as sitting erect, standing erect and responding to simple commands such as "stop," "come here" and "look". Another subcategory of Activities of Daily Living

includes his eating and meal skills. He will be expected to use manual signs to request "eat", "drink", "more", to wipe his mouth and to eat at an appropriate rate (avoiding the regurgitation problem). Under the "Toileting" category, Jonathan will be expected to acquire skills in initiating a manual sign for the need to toilet, to utilize a structured toileting schedule before going to bed and upon arising, to follow a picture schedule for toileting and to change his clothes when there is an accident. Similar basic tasks are found within the category "Domestic Skills" in which Jonathan will be expected to place his clothes and dirty towels in the appropriate places, to independently retrieve food from the refrigerator, pour it and clean up after himself. These activities of daily living do not occur

in the isolated environment of special educational programs located on a school campus. Those activities arise in "daily living" that is, when he arises in the morning, when he eats his breakfast and dinner, when he bathes and when there is a need for toileting. They are skills that are needed throughout the day and night, 24 hours per day, and cannot be contained within a 6 hour period of the day. Most telling is the language contained at the head of each of the activities of daily living; it says: "All objectives in activities of daily living will be carried out in all environments, where appropriate." Certainly, the residential after school component is one such environment where "activities of daily living" occur. Because this child cannot learn in the abstract and cannot generalize skills

from one environment into another and because the skills which this child needs to acquire are directly and predominantly associated with activities beyond a classroom, it is found that the short-term instructional objectives would be meaningless to the Annual Goals if applied only during day program hours.

Furthermore, Jonathan's multitude of deficiencies require that the acquisition of most skills be preceded by months and months (even years) of consistent, calculated training. Virginia Randolph has an excellent staff and utilizes "state of the art" techniques, but Virginia Randolph is only made available to the child for six hours each day. The rest of the day, even the bulk of the day would be turned over to non-professionals (the parents) who must deal with and train Jonathan in a manner consistent

with the professional techniques applied by VR during the school day. It is unreasonable to expect the parents, even with the assistance of a home trainer (a trainer for the parents), to be capable of providing the consistency in training and reinforcement which this child needs during the remainder of his waking hours.

The unique educational needs of Jonathan require that his Annual Goals and Short-term Objectives be addressed in an environment which is consistent from day to day all year long and which is coordinated and operated by professional and paraprofessional staff utilizing consistent techniques throughout the day and night. A day program (as proposed by the LEA) and the IEP does not assume full responsibility for the implementation of a consistent program to be carried out in all environments. Such a responsibility

being required for the IEP, it is found that the IEP and a day program would be inappropriate to implement the Annual Goals and Short-term Objectives of this child, either as originally presented in Exhibit 143 or as amended by previous discussion herein.

9. Most of the witnesses who testified at the hearing and most of the documents which were introduced as exhibits on the topic of Melmark are frank in their criticisms of the inconsistencies, dead time and "custodial" nature of the present residential placement of the child. While the LEA holds up such criticisms as clear evidence that the child does not require a consistent environment, nor consistent training, this Hearing Officer finds such criticisms insufficient to overcome the heavily qualified expert

opinions that this child continues to need consistent, structured environments. In addition, even if Melmark was the issue (which it is not), the proposed day program would not rise to the level of appropriateness just because of inadequacies of a present placement. The issues developed during these proceedings do not directly question the appropriateness of Melmark. In fact, the quality of the educational program at Melmark was only discussed in the text of having a possible educational bearing on the child's progress. Consequently, this Hearing Officer will not make any specific finding as to the quality of the overall program at Melmark or as to the particular program provided to the child at Melmark.

## DECISION

Public Law 94-142 and Section 22.1-213 et seq., Code of Virginia, require that the Board of Education and each LEA develop programs designed "to insure that all handicapped children have available to them a free and appropriate education, including special education designed to meet the reasonable education of handicapped children". The child in this matter is certainly a handicapped child. The LEA has recognized its obligation to provide educational services to the child in the least restrictive environment for many years and, in fact, a new IEP was developed for this child in a private residential placement in May, 1985. That IEP is still in effect.

The Regulations require that a child remain in his current educational placement during the pendency of any

dispute over an educational program. Once all of the issues have been resolved concerning an educational program, the LEA can implement change which comply with the resolution of those issues. Nevertheless, the Regulations are not clear as to who must bear the burden of proving that a particular placement is appropriate or inappropriate. Counsel for the parents sets forth in his memorandum of points and authorities the applicable case law which has dealt with this specific issue. At page 6 he argues:

> Citing Tatro v. Texas, 703 F.2d 823 (5th Cir. 1983)(Tatro II), Doe v. Brookline School Committee, 722 F.2d 910 (1st Cir. 1983); Lang v. Braintree School Committee, 545 F.Supp. 1221 (D. Mass. 1982) the court held that "when the suggestion is made that a child, who falls under the aegis of the EAHCA and is currently learning in what has been deemed to be an appropriate setting, be moved to a different facility, the party advocating the move should bear

the burden of proving its propriety." Id. 437.

The LEA is seeking to change the IEP and is seeking to change the placement of the child from residential to day programing. Clearly, the LEA is the movant and must bear the burden of show by a preponderance of the evidence that such changes meet the test of appropriateness articulated by the United Supreme Court. On the other hand, the third issue - violation of procedural due process - was not raised by the LEA, but was raised by the parents; consequently, the parents - movants must show by preponderance of the evidence that their procedural due process rights have been violated.

The first two issues - "appropriateness" of goals/oblectives and "appropriateness" of placement - are controlled by the analysis made by the United States Supreme Court in Board of

Education v. Rowley, 458 U.S. 176, 102 S.Ct. 3034 (1982). Previous to the decision in Rowley the lack of statutory (P.L. 94-142) and regulatory guidance had caused confusion and inconsistent substantive standards to be applied by the lower courts. In the Rowley case the district court had ruled that the term "appropriate" public education necessitated the offering of services designed to enable a child to achieve her "full potential commensurate with the opportunity provided other children". Rowley, 483 F.Supp. 536 (S.D. NY), Aff'd 632 F.2d 945 (2nd Cir., 1980). In reversing the lower courts, the Supreme Court discarded the "maximization" of potential interpretation; it said:

> Implicit in the congressional purpose of providing access to a "free appropriate public education" is the requirement that the education to which access is provided be sufficient to confer some educational

> benefit upon the handicapped child. It would do little good for Congress to spend millions of dollars in providing access to a public education only to have a handicapped child receive no benefit from that education.

Rowley, 458 U.S. at 199, 102 S. Ct. at 3048 (emphasis added). As long as the IEP is "reasonably calculated to enable the child to receive educational benefits", the child has been offered the opportunity for a free, appropriate education. Id. 458 U.S. ____, 102 St. Ct. at 3051.

The first issue - appropriateness of goals and objectives of the IEP - has been addressed in the Findings of Facts portion of this decision. Based upon those findings, the IEP as originally presented at the due process hearing contained goals and objectives which overall were reasonably calculated to provide educational benefit to Jonathan.

Concessions and modifications were made by the LEA in subsequent correspondence (Exhibit 164) and other short-term objectives were deleted by me as unrealistic and, thus, not reasonably calculated to confer education benefit. To the extent that those goals and objectives have been addressed and deleted by me, the goals and objectives on IEP were not appropriate. Nevertheless, it is believed that the modifications made by the LEA by its letter, dated November 16, 1985 (Exhibit 164), and the deletions made by me now make those goals and objectives of the IEP appropriate for the child.

The second issue - appropriateness of a day program for placement - has been addressed by several courts since the Rowley decision. The cases of Abrahamson v. Hershman, 701 F.2d 223 (1st Cir. 1983)

and Matthews v. Davis, 742 F.2d 825 (4th Cir. 1985) involved children so similar in handicaps and needs to those of Jonathan that their decisions are very instructive in analyzing the issues in this case.

In the Abrahamson case the child, Daniel, was approximately eighteen years old at the time the district court addressed his educational needs. The trial court decided the case before the Rowley decision and easily could have applied the more liberal "maximization" of potential approach, but based upon the facts before the court, it found that the "residential case was essential if Daniel was to make any educational progress at all." Abrahamson, 701 F.2d at 227.

On appeal, the First Circuit noted that the test for appropriateness was "educational benefit", not maximization.

It then addressed the question of residential placement:

> It follows from Rowley that the Act does not authorize residential care merely to enhance an otherwise sufficient day program. A handicapped child who would make educational progress in a day program would not be entitled to placement in a residential school merely because the latter would more nearly enable the child to reach his or her full potential. A school committee is required by the Act merely to ensure that the child be placed in a program that provides opportunity for some educational progress.

Id. Nevertheless, the district court decision having so clearly identified the need for 24 hour training and reinforcement as essential for any ("minimal") educational progress, the Court of Appeals found no basis to rule that the lower court findings were clearly erroneous.

In casting aside the argument that the residential care was not an educational need, but rather a

"custodial" one, the First Circuit embraced a statement made by the Third Circuit Court of Appeals: "'the concept of education is necessarily broad with respect to' some severely or profoundly retarded children. Kruelle v. New Castle County School District, 642 F.2d 687, 693). Id. at page 228. When the training that the child needs for minimal progress requires residential continuity and structure, the residential component is an educational service to which the child is entitled. Id. Residential placement of Daniel Abrahamson was affirmed.

The Matthews case involved a boy, age fourteen, who in 1979 exhibited many traits similar to those of Jonathan today: IQs in the profoundly retarded range, mental ages of less than eighteen months, and inabilities to perform even

the most basic of self-help skills (toileting, eating, dressing, etc.). David Matthews also suffered from seizures, grand and petit mal, but these were controlled by medication. (Medical reasons were not the justification for the rulings of the district court.) In contrast, Jonathan has the added factor of an atypical pervasive developmental disorder. The Matthews court ordered the LEA to set up an appropriate residential program for the child in which the child would remain during all after-school hours.

Approximately thirty months later, success was being seen in the residential program, but in light of Rowley the district court consented to hear motions regarding the residential program. The court found at the subsequent hearing that the child had reached the height of

his intellectual capacity to learn; he was at a "point of diminishing marginal return" and probably would learn nothing more. Testimony revealed that the child did not require more than continued reinforcement of already-learned skills through functional applications, and that the drills being utilized in the residential program were not necessary any longer to maintain his learned skills. On the basis that the district court had determined that "the child had done as well as could be expected, and whatever can be done in the home outside of school can be done just as easily by the parents", the residential component was terminated as an "enhancement" of an appropriate day-program. Matthews 742 F.2d at 830 and 831.

Obviously, in 1980 the district court perceived in David Matthews an ability to

continue to learn in the appropriate placement. The later Rowley decision did not fatally turn that initial 1980 placement into an enhancement of an appropriate day-program; instead, the termination of residential services for David was attributable primarily to his inability to continue to learn and the lack of purpose for residential drills. The residential placement in 1980 was not found to be educationally unnecessary for him to receive "educational benefit". The Fourth Circuit Court of Appeals noted:

> The district court's order to establish a residential program for David was entered before the Supreme Court's decision in Rowley. While no issue is now made of its entry, we should comment that the order was entirely consistent with Rowley, for it was necessary for David to receive any benefits of the type sought. Accord, Abrahamson v. Hershman.

Id. at 829.

Just as Daniel Abrahamson and David Matthews once were situated, Jonathan has the ability to continue learning new skills but he requires an environment of such consistency and structure that a residential component must be developed for him if he is expected to receive the educational benefit of the annual goals and objectives of his IEP. This Hearing Officer finds that the reasoning which went into the decision by the Abrahamson court and the decision by the Matthews court in 1980, both residential, apply just as forcefully to the educational placement question posed in this matter. The proposed day-program does not offer an appropriate public education for Jonathan.

The third issue - violations of procedural due process - has been addressed fully in the Findings of Fact.

The parents have failed to develop sufficient facts by which to establish by preponderance of the evidence that there has been a denial of their procedural rights in the placement decision-making process; consequently, no violation of due process is found.

SUMMARY

It is the decision of this Hearing Officer that the Annual Goals and Short-term Objectives, as amended by this Decision, are appropriate to meet his unique educational needs; that the proposed day program with six weeks summer school and use of a home trainer is not appropriate to meet his unique educational needs; and that the parents were not denied any procedure rights concerning placement decisions.

March 5, 1986

[signed]

Hearing Officer

CERTIFICATE OF MAILING

I hereby certify that on this 5th day of March, 1986, I did mail, by postage prepaid, a copy of this Decision to the following:

William C. Bosher, Jr.,
Superintendent of Schools

Mr. and Mrs. Howard L. Spielberg,
Parents

J. T. Tokarz, Esquire, Counsel for
LEA

Thomas F. Guernsey, Esquire, Counsel
for Parents

Dr. Andrew B. Chisick, Department of
Education

[signed]

Hearing Officer